Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

Martin C. Kaplan,

Petitioner,

v.

Robert P. Ludwig

and

Kustom Karpet Kleaners, Inc.
d/b/a Custom Carpet Cleaners,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of New York,
Appellate Division, Fourth Judicial Department

PETITION FOR WRIT OF CERTIORARI

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4988

Question Presented

Introductory Statement: The court below held that a single telephone call, in violation of several provisions of federal statute 47 U.S.C. 227 and regulations enacted thereunder (47 CFR 64.1200), amounts to a single violation of federal law. Petitioner had argued that this amounts to several violations. The statute calls for minimum damages for each violation of the statute or of the regulations — consequently, the damages are determined by the number of violations.

Question: When a single act is in violation of two or more provisions of 47 U.S.C. 227 and/or regulations enacted thereunder, are there two or more violations, or only one?

List of Parties

The caption on the cover page contains the names of all parties to the proceeding.

Petitioner is not a corporation.

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IN THE

Supreme Court of the United States

PETITION FOR WRIT OF CERTIORARI

Petitioner Martin C. Kaplan respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below

The opinion of the highest state court to review the merits appears at Appendix A-3 to the petition and is reported at 286 A.D.2d 970; 730 N.Y.S.2d 765 (4th Dept 2001).

The opinion of Wayne County Court appears at Appendix A-4 to the petition and is unpublished.

The first final decision, without opinion, of Walworth Town Court appears at Appendix A-11 to the petition and is unpublished. An amended final decision, adding an opinion, appears at Appendix A-6 to the petition and is unpublished.

Jurisdiction

The highest state court to consider the case entered a decision on the merits on September 28, 2001. A copy of that decision appears at Appendix A-2 to A-3. No rehearing was requested.

A timely motion for leave to appeal to the New York Court of Appeals was denied on the following date: December 21, 2001, and a copy of the order denying leave to appeal appears at Appendix A-1.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

28 U.S.C. 1257(a) confers jurisdiction because petitioner has exhausted the state appellate process, and the question on appeal concerns a claim under federal statute 47 U.S.C. 227.

If a fuller explanation be required that petitioner has exhausted the state appellate process, New York

law generally allows appeal from the Appellate Division either as of right or by permission. New York Civil Practice Law & Rules (CPLR) §5601, which allows appeal as of right, is unavailable to petitioner because: the case originated in City Court (CPLR §5601(a)); the question on appeal does not involve constitutional issues (CPLR §5601(b)); there has been no order granting a new trial (CPLR §5601(c)); and there has been no Appellate Division order on a prior appeal (CPLR §5601(d)). CPLR §5602 allows appeal to the New York Court of Appeals by permission of either the Appellate Division or the Court of Appeals. Permission of the Court of Appeals is unavailable because the case originated in City Court (CPLR §5602(a)(1)), and no party is a governmental entity (CPLR §5602(a)(2)). Petitioner did seek permission of the Appellate Division, as allowed by CPLR §5602(b). Permission was denied by a decision entered 12/21/01, which appears at Appendix A-1 to the petition.

Statutes and Regulations Involved

47 U.S.C. 227, 47 CFR 64.1200, and New York General Business Law §399-p are the statutes and regulations involved. They are lengthy, and appear in the Appendix at A-12 *ff, infra*, under Court Rule 14(f).

Statement of the Case

Petitioner sued for statutorily specified damages for respondents' single telephone solicitation in violation of numerous provisions of federal and state law.

The facts are undisputed. Defendants delivered a prerecorded telephone solicitation to plaintiff without prior consent (violating 47 U.S.C. 227(b)(1)(B)). The message didn't disclose the caller's address, telephone number, or full name (violating 47 CFR 64.1200(d)(1), (d)(2), (e)(2)(iv), New York General Business Law §399-p(3)(a)). Defendants had no available written policy

for maintaining records of persons asking not to be called again (violating 47 CFR 64.1200(e)(2)(i)).

47 U.S.C. 227(b)(3)(B) provides $500 statutory damages for each violation of federal statute or regulation. At trial (Walworth Town Court), plaintiff sought $500 damages for each federal provision violated, even though there was just one telephone call. (Plus $50 state law statutory damages under N.Y. Gen Bus Law §399-p(9).) Plaintiff raised the federal question during argument in open court. "The fact that these multiple violations resulted from a single phone call does not preclude awarding cumulative damages for each violation. The rule on multiple violations resulting from a single act was stated by the U.S. Supreme Court in Blockburger v. United States, 284 U.S. 299, 304 (1932). * * * I have listed 6 distinct violations in Table 1, which qualify under 47 USC 227(b)(3)(B) for $500 minimum statutory damages for each violation. * * * Further, the violations listed in Table 1 also qualify as distinct violations under the Blockburger rule...." (Record at R13) Additionally, plaintiff submitted during trial a written citation of the pertinent language from *Blockburger*, exhibited at R63 of the Record. Walworth Town Court dismissed (see decisions at A-11 and A-6, *infra*), not reaching the federal question.

On appeal to Wayne County Court, petitioner again raised the federal question. "Although the case involves a single telephone solicitation, that solicitation involved several violations of law, each carrying a minimum penalty. (See Points 3, 5) The question of whether multiple violations result in cumulative penalties, even though resulting from a single act, was answered by the U.S. Supreme Court in *Blockburger*, *infra*." (Plaintiff's brief to County Court, Point 4, footnote omitted) County Court awarded $50 damages for state law violation, but nothing for federal violation, and did not reach the federal question. (See decision at A-4 *ff*, *infra*)

On higher appeal, the Appellate Division of New York's Supreme Court added $500 damages for one federal law violation, bringing the total damages to $550. The Appellate Division found violation of three federal law provisions argued by plaintiff: 47 U.S.C. 227(b)(1)(B), 47 CFR 64.1200(e)(2)(i), and (e)(2)(iv).[1] However, the Appellate Division held that this amounted to just one federal violation.[2] Point 5 in plaintiff's brief below argued the federal question at length, consuming 4 pages. "The question of whether the multiple violations yield cumulative damages, even though resulting from a single act, is answered in the following sub-points (A) through (E). Briefly, *express* statutory intent is controlling regarding cumulative damages (Point 5(C)), while absent express intent the controlling precedent is *Blockburger* (see Point 5(A), next)." (Plaintiff's appeal brief to Appellate Division, Point 5) At oral argument, the court's sole question concerned the federal question. Plaintiff answered by citing and explaining the rule of construction in *Blockburger*. Plaintiff's brief also cited precedents that followed *Blockburger*: *Iannelli v. United States*, 420 U.S. 770 (1975), Footnote 17; *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *Whalen v. United States*, 445 U.S. 684, 691 (1980); and *Lovgren v. Byrne*, 787 F.2d 857, 863 (3rd Cir. 1986).

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[1] The court also cited 47 U.S.C. 227(b)(2)(B), which was not argued by plaintiff, and somewhat perplexes petitioner.

[2] The Appellate Division decision appears at A-3, *infra*. The salient language is:

> "We modify the order of County Court and the judgment of Town Court by awarding plaintiff, as against both defendants, judgment in the principal sum of ***$550***, plus interest commencing from March 21, 2000, together with costs and disbursements. Plaintiff established ***a violation*** of both the Federal statute and regulations and the State statute (see, ***47 USC § 227 [b] [1] [B]; [2] [B]; 47 CFR 64.1200 [e] [2] [i],[iv];*** General Business Law § 399-p[3] [a])." (Emphasis added)

Plaintiff requested permission to appeal on the federal question, to the Court of Appeals of the State of New York. Permission was denied (see p. A-1, *infra*). This exhausted the state appellate process.

Reasons for Granting the Writ

Point 1 The court below has knowingly disregarded precedent of this Court

The decision of the court below, finding that violation of several federal law provisions amounts to just one violation, is contrary to this Court's precedent. Petitioner's brief and oral argument below addressed this issue at length. Yet, the court below decided contrary to this Court's precedent, offering no alternative precedent, and not even stating grounds. Such disregard for this Court must not be allowed to stand, lest it be invoked as more "on point" than the Court's own precedents. Moreover, flagrant disregard for this Court's decisions must be discouraged.

"The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." (*Blockburger v. United States*, 284 U.S. 299, 304 (1932))

"The rule of construction which the courts have utilized in answering this kind of question was announced in *Blockburger v. United States* * * * [Note 4:] Where the provisions at issue are not statutes, but regulations, we see no reason for a different analysis." (*Lovgren v. Byrne*, 787 F.2d 857, 863 (3rd Cir. 1986))

Petitioner's brief below also cited other cases where the Court followed *Blockburger*,[3] declaring it

[3] "For over half a century we have determined whether a defendant has been punished twice for the 'same offense' by applying the rule set forth in *Blockburger v. United States*, 284

well-settled law. Further, the brief carefully applied the *Blockburger* rule to the various violations alleged, demonstrating that they all satisfy the *Blockburger* rule, and thus must be considered distinct violations with cumulative damages.

Clearly, the court below simply refused to follow *Blockburger*, without even a dissent among the 5 justices.

Flagrant disregard for this Court's precedent erodes the authority of the Court, and sows confusion by creating conflicting precedent. This is a strong reason for granting certiorari.

> "A conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a ***strong reason*** for the granting of certiorari. See *Hudson v. Louisiana*, 450 U.S. 40, 42 (1981); *William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 14 (1974); *Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 371-72 (1974). Note 78: See also *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984), where the Court stated: 'We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court.' " (R.L. Stern, E. Gressman, S.M. Shapiro & K.S. Geller, Supreme Court Practice, (7th ed. 1993), page 208. Emphasis added.)

For reviewability, the court below must have decided the federal question, "but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough." (*New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928))

U.S. 299, 304 (1932)." (*Rutledge v. United States*, 517 U.S. 292, 297 (1996)) And *Whalen v. United States*, 445 U.S. 684, 691 (1980), notes that the *Blockburger* rule has been "consistently relied on ever since" it issued.

Point 2 Courts disagree on the federal question

Lower courts have come down on both sides of the federal question.[4] The opinions show failure to identify *Blockburger* as relevant precedent, unlike the instant case where *Blockburger* was vigorously called to the attention of the court below. Lower courts are treating the federal question as a matter of first impression, or sometimes citing one-another as precedent. Halting this growing confusion and conflict in the lower courts is another reason to grant certiorari.

Point 3 Summary disposition is appropriate

The deviation of the court below from *Blockburger* is so apparent that summary disposition is appropriate. The facts of the case are unnecessary to recognize failure to follow *Blockburger*. The decision below finds violation of 47 U.S.C. 277(b)(1)(B), 47 CFR 64.1200(e)(2)(i), and (e)(2)(iv). Each of these three

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[4] Other decisions finding a single violation for a telephone call in violation of multiple provisions of 47 U.S.C. 227 and 47 CFR §64.1200 include: *Worsham v. Nationwide Ins. Co.*, 138 Md. App. 487, 772 A.2d 868 at footnote 5 (Md. Ct. Spec. App. 2001), cert. den'd 365 Md. 268, 778 A.2d 383 ("We find the cases awarding the monetary remedy on a 'per call' basis rather than a 'per violation' basis more persuasive."); *Charvat v. Colorado Prime*, 1998 WL 634922, *5, 1998 Ohio App. LEXIS 4292, *13 ("compensation should be based on the number of telephone calls"); and *Szefczek v. Hillsborough Beacon*, 286 N.J. Super. 247, 668 A.2d 1099 (1995) (finding violation of both 47 CFR §64.1200(e)(2)(ii) and (e)(2)(iii), but awarding only $500 per call; the statute specifies damages of $500 per "violation," implying that the court found one violation per call).

Decisions finding multiple violations by a single telephone call include: *Adamo v. AT&T*, 2001 Ohio App. LEXIS 4989 (Nov. 8, 2001) (affirming award of damages for violation of both 47 U.S.C. 227 and damages for violation of 47 CFR 64.1200); and *Kaplan v. Life Fitness Center*, No. 1999 SC 11448 (Rochester City Ct., December 13, 1999) (awarding damages for a single telephone call of $500 for violation of 47 U.S.C. 227(b)(1)(B) plus another $500 for violation of 47 CFR §64.1200(d)(1)).

provisions requires proof of a factual element not required by the others, which are, respectively: (1) no emergency nor prior express consent, (2) no written policy available upon demand, and (3) no telephone number nor address. Thus, the *Blockburger* test is plainly satisfied, and violations of these provisions must not be merged into a single violation. The court below gave no reason for ignoring *Blockburger*.

Although a number of other interesting issues have arisen in this action and similar actions,[5] this petition is confined to just the federal question presented. On that question, the error of the court below is flagrant.

Point 4 Reversal and remand to a different judge below are merited

Reversal on the federal question is appropriate, by summary disposition as analyzed above. There need be no new trial: the trial was without jury; the facts are undisputed and suffice to establish the various violations argued by plaintiff; and the damages are set by statute. However, further judicial proceedings on remand are needed: to assess additional damages at $500 per violation instead of per phone call, and to consider the additional violations alleged by plaintiff but not reached by the court below.[6]

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[5] Various other issues have arisen in this action, or similar actions, under 47 U.S.C. 227 in the lower courts, including: do state courts have jurisdiction under 47 U.S.C. 227(b)(3) absent express state legislative authorization; which statutory causes of action pertain; does the federal law apply to intra-state telephone calls; do the statute and regulations unconstitutionally infringe upon freedom of speech; and what constitutes willful or knowing violation? These questions continue to be hashed out in the lower courts, with due respect for precedents from courts above.

[6] Plaintiff argued violation of numerous federal provisions. The court below found violation of three of those provisions, but was silent regarding additional provisions. Presumably the court below considered additional violations moot, having already

Petitioner asks that if summary reversal and remand be the decision, then the remand not go to the original trial judge. Petitioner believes the judge demonstrated bias, and poor knowledge of both substantive and adjective law. A few brief examples should suffice. The trial judge actually found both a state law violation (New York General Business Law §399-p(3)(a)) and a federal law violation (47 U.S.C. 227(b)(1)(B)). (See decision at Appendix p. A-6 *ff.*) The statutes plainly call for minimum damages.[7] Yet, the judge awarded no damages, clearly failing to follow the plain statutory language. The judge's opinion was so confused as to defy concise analysis — on appeal, the court below simply declared that plaintiff proved violations and awarded damages, not analyzing errors.

The trial judge also cut short plaintiff's cross-examination of defendant Ludwig (see Record at R17) after a few minutes, advising Ludwig that he need not answer any further questions. Upon plaintiff's objection, the judge explained that Ludwig need not incriminate himself. This is an astonishingly poor understanding of adjective law. A defendant cannot voluntarily take the stand in his own defense, and then invoke fifth amendment privilege to avoid cross-examination. Further, the question propounded asked for the name of the salesman who sold Ludwig his autodialer. It is inconceivable how answering could incriminate Ludwig.

The judge also accused plaintiff of contributing to the damages, by failing to avail himself of the do not call list provided by the federal law. However, each telemarketer maintains a separate do not call list. Prior to defendants making the telemarketing call at

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decided damages on a per telephone call basis, rather than a per violation basis.

[7] Minimum damages of $50 for the state law violation (New York General Business Law §399-p(9)), and $500 for the federal law violation (47 U.S.C. 227(b)(3)(B)).

issue, there is no feasible way plaintiff could have anticipated telemarketing from these particular defendants and asked to be on their do not call list.

Finally, the judge issued an amended decision (see decisions at A-11 and A-6) two months *after* plaintiff filed notice of appeal (see Record at R85), adding 3 pages of opinion. The judge had no jurisdiction for amending the decision (no party moved the court), especially for adding grounds for the dismissal after appeal already had been filed.

Remand to this judge would be unfair.

Conclusion

The petition for a writ of certiorari should be granted, to resolve disparity among the lower courts, and more importantly to correct the refusal by the court below to follow this Court's precedent.

Summary disposition is appropriate: reversal on the federal question, and remand (to other than the original trial judge) to consider additional violations and damages in accordance with this Court's decision.

Respectfully submitted,

Dated: March 11, 2002

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Appendix

Appellate Division denial of motion for leave to appeal to New York Court of Appeals (12/21/01)

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

MOTION NO. 1137/01
DOCKET NO. CA 01-00183

PRESENT: GREEN, J. P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ.

MARTIN C. KAPLAN, PLAINTIFF-APPELLANT,

V

ROBERT P. LUDWIG AND KUSTOM KARPET KLEANERS, INC., D/B/A CUSTOM CARPET CLEANERS, DEFENDANTS-RESPONDENTS.

Appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered September 28, 2001,

Now, upon reading and filing the affidavit of Martin C. Kaplan sworn to October 23, 2001, the notice of motion with proof of service thereof, and due deliberation having been had thereon,

It is hereby ORDERED that the motion be, and the same hereby is, denied.

Entered: December 21, 2001
CARL M. DARNALL, CLERK

Appellate Division order below, *KAPLAN v. LUDWIG*, 286 A.D.2d 970 (4th Dept 2001) (9/28/01)

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1137

PRESENT: GREEN, J. P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ.

CA 01-00183

MARTIN C. KAPLAN, PLAINTIFF-APPELLANT,

V

ROBERT P. LUDWIG AND KUSTOM KARPET KLEANERS, INC., D/B/A CUSTOM CARPET CLEANERS, DEFENDANTS-RESPONDENTS.

Martin C. Kaplan having appealed to this Court from the order of the Wayne County Court, entered in the Wayne County Clerk's Office on December 4, 2000, affirming the judgment of the Town Court of the Town of Walworth dated March 21, 2000, and said appeal having been argued by Martin C. Kaplan, plaintiff-appellant, there being no brief or argument on behalf of defendants-respondents, and due deliberation having been had thereon,

It is hereby ORDERED that the order so appealed from and the judgment of Wayne Town Court be and the same hereby are unanimously modified on the law by awarding plaintiff, as against both defendants, judgment in the principal sum of $550, plus interest commencing from March 21, 2000, together with costs and disbursements and as modified the order and judgment are affirmed with costs to plaintiff.

Memorandum that is hereby made a part hereof.

Entered: September 28, 2001

CARL M. DARNALL, Clerk

Appellate Division memorandum, made a part of order below, *KAPLAN v. LUDWIG*, 286 A.D.2d 970 (4th Dept 2001) (9/28/01)

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

(1137) CA 01-00183. (Wayne Co.) -- MARTIN C. KAPLAN, PLAINTIFF-APPELLANT, V ROBERT P. LUDWIG AND KUSTOM KARPET KLEANERS, INC., D/B/A CUSTOM CARPET CLEANERS, DEFENDANTS-RESPONDENTS. -- Order and Judgment unanimously modified on the law and as modified affirmed with costs to plaintiff in accordance with the following Memorandum: Plaintiff commenced this small claims action seeking damages for defendants' alleged multiple violations of Federal and State law governing the activities of telemarketers and other makers of unsolicited business calls (see, 47 USC § 227; 47 CFR 64.1200; General Business Law §399-p [3]). Town Court dismissed the claim, and, upon plaintiff's appeal, County Court modified the judgment of Town Court by awarding plaintiff $50 in presumed damages for a violation of General Business Law § 399-p.

We modify the order of County Court and the judgment of Town Court by awarding plaintiff, as against both defendants, judgment in the principal sum of $550, plus interest commencing from March 21, 2000, together with costs and disbursements. Plaintiff established a violation of both the Federal statute and regulations and the State statute (see, 47 USC § 227 [b] [1] [B]; [2] [B]; 47 CFR 64.1200 [e] [2] [i], [iv]; General Business Law § 399-p [3] [a]). (Appeal from Order of Wayne County Court, Parenti, J. - Small Claims.) PRESENT: GREEN, J. P., HURLBUTT, SCUDDER, KEHOE AND GORSKI, JJ. (Filed Sept. 28, 2001.)

Wayne County Court decision (12/4/00)

Index #47429 Entered: 12/4/00

STATE OF NEW YORK
COUNTY COURT COUNTY OF WAYNE

MARTIN C. KAPLAN
Plaintiff/Appellant

-vs- DECISION

ROBERT P. LUDWIG
and KUSTOM KARPET KLEANERS, INC.
D/B/A CUSTOM CARPET CLEANERS
Defendants/Respondents

MARTIN C. KAPLAN
Plaintiff/Appellant pro se

ROBERT P. LUDWIG
KUSTOM KARPET KLEANERS, INC.
D/B/A CUSTOM CARPET CLEANERS
Defendants/Respondents pro se

C R PARENTI, J.

This matter is currently before the Court on appeal from a decision of the Hon. Terence M. Wolfe from the Small Claims part of the Walworth Town Court.

The record indicates that a trial was held in the Walworth Town Court. Plaintiff alleged an action under various statutes including 47 USC 227, 47 CFR 64.1200 and New York General Business Law §399-p. Plaintiff claimed damages as a result of a recorded telephone solicitation. As a result of said trial, Judge Wolfe determined that defendant's calls fell under §227(c) which requires more than one telephone call and that, given that there was only a single call herein, plaintiff's claim failed. The court further

found that plaintiff's claim failed under §64.1200. Lastly, the judge found that there was only a single violation of the General Business Law which would entitle plaintiff to the greater of actual damages or $50.00, but that the plaintiff had contributed to damages by failing to avail himself of a "do not call" option.

The sole grounds for appeal from a small claims action is "that substantial justice has not been done between the parties according to the rules and principles of substantive law". See Uniform Justice Court Act §1807. Only where a judgment rendered in a small claims action is so shocking as to not be substantial justice, should such judgment be overturned. See Coppola v. Kandey Company, 236 AD2d 871 (4th Dept. 1997) See also, Blair v. Five Points Shopping Plaza Inc., 51 AD2d 167 (3rd Dept. 1976).

Based upon its review the Court does not find the decision of the lower court to be so shocking or that substantial justice was not done. However, the court below did find a single violation of General Business Law §399-p. Pursuant to §399-p(9) plaintiff would have been entitled to recover damages of $50.00. While it appears as if the lower court held that plaintiff should not recover any damages because he failed to mitigate damages, the statute does not contain such provision. Thus, defendant should have been directed to pay to plaintiff $50.00 as and for the violation of §399-p found by the court below. Therefore, the decision of the Walworth Town Court is affirmed, except as modified herein to provide for payment of $50.00 by defendant to plaintiff. This decision shall constitute the order of the Court.

Dated: November 27, 2000.

s/Carmen R. Parenti
Carmen R. Parenti
Wayne County Judge

Walworth Town Court, amended final decision (6/6/00)

Case no: 00020001

WALWORTH TOWN COURT — COUNTY OF WAYNE
TOWN OF WALWORTH — STATE OF NEW YORK

Martin C. Kaplan, Plaintiff

-vs-

Robert P. Ludwig, and
Kustom Karpet Kleaners, Inc.
D/b/a Custom Carpet
Cleaners, Defendants

A Small Claims trial on the above captioned case was held in the Walworth Town Court on March 7th 2000, Judge Terence M. Wolfe presiding.

Plaintiff Martin Kaplan claims damages of $3000 resulting from a recorded telephone solicitation as follows:

A recording that both Plaintiff and Defendant agree was the same as text heard by the plaintiff on or about February 20, 1999 was played for the court. This recording forms the basis of the claim. The total time of the recording was 63 seconds.

At the beginning of the recording a voice identifies itself as "Bob of Custom Carpet Cleaners". The message soliciting business for a carpet and upholstery cleaning company was delivered in a clear and courteous voice. At one point the voice apologizes for "using this silly machine". At the end of the message the option to "Press 8" to speak with someone was offered. The plaintiff stated that he did press 8 and was informed that there were now two

options; press "9" to hold for a person or press "8" to be removed from the calling list. The plaintiff pressed "9" to speak with someone and was informed that nobody was available and "please leave your name and number". The plaintiff hung up.

The key points are as follows:

1. The phone solicitation was received at about 10:05 AM on 2/20/1999 at Mr. Kaplans residential phone. No live person spoke from Custom Carpet Cleaners at any point during this call.
2. There was no address or return phone number given during this recording.
3. The plaintiff, (Mr. Kaplan), remained on the phone and did not hang-up, or select the option to be removed from the calling list.
4. The total time of the initial phone call was just over 1 minute. Mr. Kaplan stayed on the phone for an additional period of time before hanging up the phone. Mr. Kaplan did not leave his name or phone number, and did not chose to be put on the "do not call" list.

There is no issue of facts regarding the tape message since both parties stipulated that this was in fact the same message sent on 2/20/1999 and the voice was that of the defendant Robert P. Ludwig.

The plaintiff presented a packet of information to the Court outlining his case under various statutes including 47-USC-227, 47-CFR-64.1200, and GBL-399-p. This packet of information was labeled "Evidence and Law" and is attached and made a part hereof. The plaintiff pointed out to the Court that the Court has jurisdiction over this case based on a Supreme Court, Appellate Division, Fourth Department case (Kaplan vs. Democrat and Chronicle 698 NYS 2d 799).

Mr. Kaplan further claims that he is entitled to treble damages plus expenses and interest for a total claim in excess of $9,000.00

The plaintiff claimed that several violations took place during the 60-second phone call on 2/20/1999.

1. Mr. Ludwig did not properly identify himself at the beginning of the phone call.
2. The Phone message was prerecorded.
3. The company was not properly identified.
4. There was no phone number or address of the company given.
5. Mr. Ludwig did not have a written "do not call" procedure.

On point one, the Court finds that while Mr. Ludwig identified himself as "Bob" and not "Robert Ludwig", there is only one person named "Bob" at Custom Carpet Cleaners" and this identification was clearly given as "Bob with Custom Carpet Cleaners".

Point two, the message was in fact prerecorded. This is a violation of 47-USC-227(b)(1)(B) and 47-CFR-64.1200(a)(2).

Point three, Mr. Kaplan made a major point of the dual spelling of "Custom Carpet Cleaners" or "Kustom Carpet Kleaners", in fact BOTH spellings are present in the Rochester phone book and the Court finds no intent to hide behind an obscure spelling.

Point four, there was in fact no phone number or address given and Mr. Kaplan claims that this is a violation of 47-USC-227(b)(1)(B) and GBL-399-p(3)(a).

Point five, Mr. Ludwig is the sole proprietor of Custom Carpet Cleaners and personally purchased the telephone solicitation software. Under cross examination Mr. Ludwig stated that the procedures for "do not call" list maintenance were provided with the software. It is the Courts opinion that this procedure provided by the manufacturer is sufficient,

and a separate procedure personally written by Mr. Ludwig was not required.

A more careful study of 47-USC-227 reveals the following:
Under 227(a)(1) the definition of the term "automatic telephone dialing system" means equipment which has the capacity-

(A) to store or produce telephone numbers to be called using a random or sequential number generator, and
(B) to dial such numbers.

This is clearly different from the wording under 47-USC-227(c)(3). Here the use of a database for storing telephone numbers of subscribers who object to receiving telephone solicitations is permitted. If the overall intent of 227 was to prohibit or prevent telephone solicitations then there would be no need for 227(c)(3). Furthermore there is a significant difference between the 'Private right of action' under 227(b)(3) and 227(c)(5).

227(b)(3) allows 'Private right of action' for a single offense, whereas 227(c)(5) clearly states that the 'Private right of action' "requires more than one telephone call within any 12-month period by or on behalf of the same entity..."

Since the equipment used by Mr. Ludwig utilized a disk based phone number database and a "Do not call" database his calls fall under 227(c)(5). If he had used a random or sequential number generator to produce the phone numbers then 227(b)(3) would have applied.

All claims under 47-CFR-64.1200 are also subject to (and limited by) the same definition as it is set forth in 64.1200(f)(1).

This leaves a single violation of GBL-399-p(3)(a) since the address and phone number of Custom Carpet

Cleaners was not included in the message. GBL-399-p-(9) sets forth the right of action for a person receiving a phone solicitation and GBL-399-p is not limited by the definition of an "automatic telephone dialing system". This single violation would entitle Mr. Kaplan to the greater of actual damages or $50.00. Except for the fact that the Court finds that Mr. Kaplan has contributed to the "damages" by failing to avail himself of the "do not call" option.

While the Court sympathizes with Mr. Kaplan in the understanding that unsolicited phone calls are, at times, a nuisance, it is not the belief of this Court that the statute was created to enrich the plaintiff in response to a single violation on the part of this defendant. It is further the feeling of this Court that Mr. Kaplan is well versed in the methods of preventing further phone solicitations by availing himself of the "do not call" database. Mr. Kaplan stated that he has chosen not to avail himself of this option. Mr. Kaplan has thereby deliberately left himself open to future telephone solicitations, and possible profit.

Claim for penalty or compensation was denied.

The forgoing constitutes the decision and order of the Court.

Dated: June 6, 2000

s/ T. Wolfe
Walworth Town Court
Terence M. Wolfe
Town Justice

See also: "Kaplan vs. Democrat and Chronicle" (698 NYS 2d 799)
"Martin C. Kaplan vs. First City Mortgage et. al." (183 Misc 2d 24, 701 NYS 2d 859)

Walworth Town Court, first final decision (3/21/00)

STATE OF NEW YORK
WAYNE COUNTY

WALWORTH TOWN COURT
SMALL CLAIMS PART

Martin C. Kaplan;
Claimant

vs.

Robert P. Ludwig;
dba Custom Carpet Cleaners
Kustom Karpet Kleaners,

NOTICE OF SMALL CLAIMS JUDGMENT

Case no: 00020001
Hon. Terence M. Wolfe, Presiding

PLEASE TAKE NOTICE THAT after hearing the proof and facts between the parties and deliberating thereon, the Court's decision is:

The Claim Was DismissedNo monetary award

Dated: March 21, 2000

s/Terence M. Wolfe
Hon. Terence M. Wolfe
Walworth Town Justice

Statutes and Regulations involved

47 U.S.C. 227

§ 227. Restrictions on the use of telephone equipment

(a) Definitions

As used in this section--

(1) The term "automatic telephone dialing system" means equipment which has the capacity--

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(4) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

It shall be unlawful for any person within the United States--

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice--

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine; or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission--

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe--

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines--

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement; and

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State--

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall--

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone

solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall--

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with

regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of

compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall--

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and--

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State--

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b) of this section.

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States--

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page

of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that--

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits--

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3) of this section, the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the

defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) Definition

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

47 CFR 64.1200

SUBPART L--RESTRICTIONS ON TELEPHONE SOLICITATION

§ 64.1200 Delivery restrictions.

(a) No person may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice,

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(2) Initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by § 64.1200(c) of this section.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(b) For the purpose of § 64.1200(a) of this section, the term "emergency purposes" means calls made necessary in any situation affecting the health and safety of consumers.

(c) The term "telephone call" in § 64.1200(a)(2) of this section shall not include a call or message by, or on behalf of, a caller:

(1) That is not made for a commercial purpose,

(2) That is made for a commercial purpose but does not include the transmission of any unsolicited advertisement,

(3) To any person with whom the caller has an established business relationship at the time the call is made, or

(4) Which is a tax-exempt nonprofit organization.

(d) All artificial or prerecorded telephone messages delivered by an automatic telephone dialing system shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player which placed the call) or address of such business, other entity, or individual.

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(1) Before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) Written policy. Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) Training of personnel engaged in telephone solicitation. Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) Recording, disclosure of do-not-call requests. If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request. In order to protect the consumer's privacy, persons or entities must obtain a consumer's prior express consent to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a solicitation is made or an affiliated entity.

(iv) Identification of telephone solicitor. A person or entity making a telephone solicitation must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. If a person or entity makes a solicitation using an artificial or prerecorded voice message transmitted by an autodialer, the person or entity must provide a telephone number other than that of the autodialer or prerecorded message player which placed the call. The telephone number provided may

not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(v) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) Maintenance of do-not-call lists. A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do not call request must be honored for 10 years from the time the request is made.

(f) As used in this section:

(1) The terms "automatic telephone dialing system" and "autodialer" mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term "telephone facsimile machine" means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(4) The term "established business relationship" means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission.

[57 FR 53293, Nov. 9, 1992; 60 FR 42069, Aug. 15, 1995]

New York General Business Law §399-p

§ 399-p. Telemarketing; use of automatic dialing-announcing devices and placement of consumer telephone calls

1. Definitions. As used in this section, the following terms shall have the following meanings:

(a) "automatic dialing-announcing device" means any automatic equipment which incorporates a storage capability of telephone numbers to be called and is used, working alone or in conjunction with other equipment, to disseminate a prerecorded message to the telephone number called without the use of an operator;

(b) "person" means any natural person, firm, organization, partnership, association or corporation, or other entity, whether for-profit or not-for-profit;

(c) "consumer" means a natural person who is solicited to purchase, lease or receive a good or service for personal, family or household use;

(d) "consumer telephone call" means a call made to a telephone number by a telephone solicitor, whether by device, live operator, or any combination thereof, for the purpose of soliciting a sale of any consumer goods or services for personal, family or household purposes to the consumer called, or for the purpose of soliciting an extension of credit for consumer goods or services to the consumer called, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services to the consumer called or an extension of credit for such purposes; provided, however, that "consumer telephone call" shall not include a call made by a telephone corporation, as defined by subdivision seventeen of section two of the public

service law, in response to a specific inquiry initiated by a consumer regarding that consumer's existing or requested telephone service; and

(e) "telephone solicitor" means a person who makes or causes to be made a consumer telephone call.

2. No person shall operate an automatic dialing-announcing device, nor place any consumer telephone call, except in accordance with the provisions of this section. The use of such device by any person, either individually or acting as an officer, agent, or employee of a person operating automatic dialing-announcing devices, is subject to the provisions of this section.

3. Whenever telephone calls are placed through the use of an automatic dialing-announcing device, such device shall do all of the following:

(a) state at the beginning of the call the nature of the call and the name of the person or on whose behalf the message is being transmitted and at the end of such message the address, and telephone number of the person on whose behalf the message is transmitted, provided such disclosures are not otherwise prohibited or restricted by any federal, state or local law; and

(b) disconnect the automatic dialing-announcing device from the telephone line upon the termination of the call by either the person calling or the person called.

4. No person shall operate an automatic dialing-announcing device which uses a random or sequential number generator to produce a number to be called.

5. No automatic dialing-announcing device shall be used to call and no consumer telephone call shall be placed to an emergency telephone line including but not limited to any 911 or E-911 line, or any

emergency line of any volunteer fire company or fire department; any emergency medical service, ambulance service, voluntary ambulance service or hospital ambulance service as defined in section three thousand one of the public health law; any hospital, nursing home, or residential health care facility as defined in section twenty-eight hundred one of the public health law; any adult care facility as defined in section two of the social services law; or any law enforcement agency or to the telephone line of any guest room or patient room of any hospital, nursing home, or residential health care facility as defined in section two thousand eight hundred one of the public health law, or any adult care facility as defined by section two of the social services law. It shall not constitute a violation of this subdivision if the person who places such a call can affirmatively establish that the call was placed inadvertently despite good faith efforts on the part of such person to comply with the provisions of this section and such person has implemented a procedure to prevent subsequent calls from being placed to a particular prohibited telephone number.

6. [Eff. until June 1, 2001. See, also, subd. 6 below.] A telephone solicitor shall not make a consumer telephone call to a consumer unless the telephone solicitor identifies the business on whose behalf the telephone solicitor is calling and the purpose of the call immediately after making contact with the consumer to whom the call is made. Nothing contained herein shall be deemed to limit, annul, alter, or affect the provisions of subdivision three of this section.

6. [Eff. June 1, 2001. See, also, subd. 6 above.] A telephone solicitor shall not make a consumer telephone call to a consumer unless the telephone solicitor conforms with subparagraph one of paragraph b of subdivision six of section three

hundred ninety-nine-pp of this article. Nothing contained herein shall be deemed to limit, annul, alter, or affect the provisions of subdivision three of this section.

6-a. No telephone solicitor or person who places any consumer telephone call or who operates an automatic dialing-announcing device and no employer of any such telephone solicitor or person shall intentionally cause to be installed, or shall intentionally utilize, any blocking device or service to prevent the name and/or telephone number of such solicitor or person, or the name and/or telephone number of his or her employer, from being displayed on a caller identification device of the recipient of any such consumer telephone call. A violation of this subdivision shall be subject to the provisions of subdivision eight of this section.

7. (a) Federal, state or local municipalities, or any subdivision thereof, using an automatic dialing-announcing device for emergency purposes shall be exempted from the provisions of this section.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, any entity which operates a telephone warning or alert system which utilizes any such device for emergency purposes shall also be exempted from the provisions of this section.

8. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice, that the defendant has, in fact, violated this section an injunction may be issued by such court or justice enjoining and restraining any further violation,

without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. Whenever the court shall determine that a violation of subdivision three, four or five of this section has occurred, the court may impose a civil penalty of not more than two thousand dollars per call, up to a total of not more than twenty thousand dollars, for calls placed in violation of such subdivisions within a continuous seventy-two hour period. Whenever the court shall determine that a violation of subdivision six of this section, or a violation of subdivision six-a of this section, has occurred, the court may impose a civil penalty of not more than two thousand dollars. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

9. In addition to the right of action granted to the attorney general pursuant to this section, any person who has received a telephone call in violation of subdivision three, four or five of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages up to one thousand dollars, if the court finds the defendant willfully or knowingly violated such subdivisions. The court may award reasonable attorney's fees to a prevailing plaintiff.

(Added L.1988, c. 231, § 1; amended L.1992, c. 581, § 2.)